Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C 20554

In The Matter of	
SOUTHWESTERN BELL, PACIFIC BELL AND NEVADA BELL JOINT PETITION FOR PARTIAL STAY	CC Docket No. 96-262 CC Docket No. 94-1

OPPOSITION OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS
RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA"), an organization consisting of more than 500 resale carriers and their underlying product and service suppliers, urges the Commission to summarily deny the Joint Petition for a Partial Stay and for Imposition of an Accounting Mechanism Pending Judicial Review filed by Southwestern Bell Telephone Company and Pacific Bell and Nevada Bell in the captioned dockets.

The Petitioners have not justified the extraordinary relief they have requested. The Commission has already addressed the various objections raised by Petitioners and has rejected Petitioners' arguments on sound legal and policy grounds. Indeed, the Commission has specifically relied upon the existence of the challenged portions of the Orders to allay the concerns of commenters that the Commission has not been sufficiently attentive to the dangers present in the continuing ability of incumbent LECs to engage in anticompetitive 'price squeezes". Grant of the stay would allow incumbent LECs to engage in precisely the type of anticompetitive behavior which the Con-mission's access charge reforms have attempted to address, severely impairing if not outright preventing the ability of competitive telecommunications carriers to enter the local exchange/exchange access market and negatively affecting the local and interexchange market as well. And the public interest will be directly undermined by Petitioners' continuing efforts to hinder the realization of competitive local services offerings. Because a stay of the Commission's Access Charge and price Cap Orders would directly contravene the enunciated goals of the 1996 Act and impede the development of the Congressional vision of a fully competitive, integrated telecommunications marketplace, the Petition should be summarily denied.

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OPPOSITION OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.45(d) of the Commission's Rules, 47 C.F.R § 1.45(d), hereby opposes the Joint Petition for a Partial Stay and for Imposition of an Accounting Mechanism Pending Judicial Review ("Petition") filed by Southwestern Bell Telephone Company and Pacific Bell and Nevada Bell (collectively, the "Petitioners") in the captioned dockets. In the Petition, Petitioners urge the Commission to stay the effectiveness of critical elements of the access charge reforms adopted in the First Report and Order in CC Docket No. 96-262, Access Charge Reform, FCC 97-158 (released May 16, 1997) ("Access Charge Order"), the Fourth Report and Order in CC Docket No. 94-1, and Second Report and Order in CC Docket No. 96-262, Price Cap Performance Review for Local Exchange Carriers and Access Charge Reform, FCC 97-159 (released May 21, 1997) ("Price Cap Order"). Given that the Petitioners have failed to adequately justify the extraordinary relief they request, TRA urges the Commission to summarily deny the Petition.

I.

INTRODUCTION

TRA, an association consisting of more than 500 resale carriers and their underlying product and service vendors, was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of inter-exchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and inter-net services. TRA's resale carrier members are also among the many new market entrants that are or will soon be offering local exchange and/or exchange access services, generally through traditional "total service" resale of incumbent local exchange carrier ("LEC") or competitive LEC retail service offerings or by recombining unbundled network elements obtained from incumbent LECs, often with their own switching facilities, to create "virtual local exchange networks." TRA's resale carrier members, accordingly, are not only the direct competitors of incumbent LECs such as Petitioners in the local exchange, long distance and other markets but are reliant on incumbent LECs for wholesale services and access to unbundled network elements, as well as for exchange access services.

Petitioners seek to nullify essential checks established by the Commission to limit the ability of incumbent LECs to utilize then continuing control of "bottleneck" facilities to suppress the emergence of competition in the local exchange/exchange access market and to

disrupt competitive conditions within the interexchange market. The stay requested by Petitioners would not only hinder the ability of the small and mid-sized carriers that comprise the rank and file of TRA's membership to enter the local exchange/exchange access market and to provide competitive local telephone service offerings, but would place these same small and mid-sized carriers at a serious disadvantage in competing against the interexchange affiliates of the incumbent LECs. Petitioners have altogether failed to demonstrate not only that the relief they request would further the public interest but that irreparable harm would befall them absent a stay of the Commission's Access Charge and Price Cap s. Further, the Commission's clearly enunciated policy rationale for the actions which Petitioners seek to stay militate strongly against Petitioners' success on the merits. The exacting standards required for grant of a stay are clearly not satisfied here.

It is well settled that a stay of a Commission action is an extraordinary form of relief which requires satisfaction of a stringent multi-pronged test.[1] In addressing requests for extraordinary relief, the Commission has long applied the four-factor test announced in Virginia Petroleum Jobbers Association v. FCC, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).[2] Thus, an applicant for stay must show that (i) it *is* likely to succeed on the merits on appeal; (ii) it will suffer irreparable harm in the absence of a stay; (iii) a stay would not substantially harm other interested parties; and (iv) a stay would serve the public interest.

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[1] See, e.g., Request of Radiofone, Inc. for a Stay of the C Block Broadband PCS Auction and Associated Rules, 11 FCC Rcd. 5215 (1995).

[2] *See,* e.g., Price Cap Regulation of Local Exchange Carriers, 10 FCC Rcd. 11979, ¶ 17 (1995); Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd. 123, ¶ 6 (1992).

While in some circumstances these criteria can be balanced such that a particularly strong showing under one test can compensate for a weak showing under another, a failure to make a threshold showing under any one of the criteria is generally fatal.[3]

Petitioners have satisfied none of these four criteria in their Petition, The Commission has already addressed the various objections raised by Petitioners and has rejected Petitioners' arguments on sound legal and policy grounds. Indeed, the Commission has specifically relied upon the existence of the challenged portions of the Orders to allay the concerns of commenters that the Commission has not been sufficiently attentive to the dangers present in the continuing ability of incumbent LECs to engage in anticompetitive "price squeezes". Grant of the stay would allow incumbent LECs to engage in precisely the type of anticompetitive behavior which the Commission's access charge reforms have attempted to address, severely impairing if not outright preventing the ability of competitive telecommunications carriers to enter the local exchange/exchange access market and'negatively affecting the interexchange market as well. And the public interest will be directly undermined by Petitioners' continuing efforts to hinder the development of competitive local services offerings. Because a stay of the Commission's Access Charge and Price Can Orders would directly contravene the enunciated goals of the 1996 Act and impede the realization of the Congressional vision of a fully competitive, integrated telecommunications marketplace, the Petition should be summarily denied.

[3] See, *e.g.*, Review of Sections 68.104 Connection of Simple Inside Wiring to the Telephone Network, 5 FCC Rcd. 5228, ¶ 14 (1990).

II.

ARGUMENT

A. The Stay Sought by Petitioners Would Impose Severe Competitive Harm on Other Interested Parties

Petitioners allege that no harm would result to other parties as a result of the requested stay. This is clearly not true. As an initial matter, the Commission has noted that incumbent LEC have been "able (because of their protected monopoly positions) to charge above-cost rates to other end users."[4] In order to allow competing providers an economically neutral opportunity to provide local exchange/exchange access services, the Commission has determined that it is imperative that incumbent LECs be precluded from assessing interstate access charges on competitive LECs utilizing unbundled network elements. It is a truism that "[a]llowing incumbent LECs to recover access charges in addition to the reasonable cost of such facilities would constitute double recovery because the ability to provide access services is already included in the cost of the access facilities themselves." Indeed this outcome was rejected by the Cornmission in recognition of the fact that "the added cost to competitive LECs would impair, *if not foreclose*, their ability to offer competitive access services."[5]

While exempting unbundled elements from interstate access charges does avoid the inequitable prospect of a "double recovery", the Commission's Orders serve an additional and

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[4] Access Charge Reform (First Report and Order), CC Docket No. 96262, FCC 97-158, ¶ 33 (released May 16, 1997) ("Access Charge Or,,").

[5] Access Charge Order, FCC 97-158 at ¶ 337.

even more important function. As the Commission has acknowledged, "an incumbent LEC's control of exchange and exchange access facilities may give it the incentive and ability to engage in a price squeeze."[6] By exempting competitive LECs utilizing unbundled network elements from the obligation to pay interstate access charges the Commission has endeavored to limit the ability of incumbent LECs to engage in such anticompetitive pricing tactics, an indispensable safeguard if the 1996 Act's fundamental promise to all telecommunications carriers of an opportunity to compete is to retain its vitality.

As TRA and other commenters have argued, if interstate access charges are imposed upon purchasers of unbundled network elements not only while incumbent LECs retain their dominant position in the local exchange/exchange access market, but following entry by the Regional Bell Operating Companies ("RBOCs") into the "in-region", interLATA market, incumbent LECs will be able to leverage their continued control of "bottleneck" facilities not only to disadvantage interexchange carrier ("IXC") competitors, but to retard the development of local exchange/exchange access competition. The competitive harm associated with this type of manipulative behavior cannot possibly be recompensed by the mere return of overpayments at some later date as suggested by Petitioners. Simply put, new market entrants will never be able to recoup, or even quantify, the damage resulting from the inability to effectively compete for the pendency of the stay.

The Commission has specifically noted that "[a]bsent appropriate regulation, an incumbent LEC and its interexchange affiliate could potentially implement a price squeeze once

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[6] Id. at ¶ 278.

the incumbent LEC began offering in-region, interexchange toll services."[7] IXCs will be particularly vulnerable to price squeezes "[b]ecause interstate access services are a necessary input for long-distance services"[8] and as numerous parties have argued,

> an incumbent LEC can create a situation where the relationship between the LEC's "high" exchange access prices and its affiliates "low" prices for long-distance service forces competing long-distance carriers either to lose money or to lose customers even if they are more efficient than the LEC's affiliate at providing long-distance services.[9]

Further, as the Department of Justice has noted,

> "there are substantial economies of scope in the provision of local exchange and exchange access services . . . new entrants will need the revenue streams from both services to support the high cost of constructing competing local exchange facilities. [I]f incumbent LECs are allowed to maintain market power over exchange access services, then when the BOCs are allowed into in-region long distance markets, the BOCs will be able to underprice other competitors in the sale of long distance services, and in the sale of bundled local and long distance services, and could thus undermine current competitive conditions in the long distance market.[10]

The Commission has expressly addressed these concerns, stating that "we have in place adequate safeguards against such conduct"" precisely because

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[7] Id. at ¶ 277.

[8] Id. at ¶ 275.

[9] Id.

[10] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Local Competition First Report and Order), 11 FCC Rcd. 15499, ¶ 346 (1996), *pet. for rev. pending sub nom.* Iowa Utilities Board v. FCC, Case No. 96-3321 (8th Cir. filed September 5, 1996), *recon.* FCC 96-394 (September 27, 1996), further recon. FCC 96476 (December 13, 1996), *further recon. pending.*

[11] Access Charge Order, FCC 97-158 at ¶ 278.

> if an incumbent LEC does attempt to engage in an anticompetitive price squeeze against rival long-distance providers . . . a competitor will be able to purchase unbundled network elements to compete with the incumbent LEC's offering of local exchange access. Therefore, so long as an incumbent LEC is required to provide unbundled elements quickly, *at economic cost,* and in adequate quantities, an attempted price squeeze seems likely to induce substantial additional entry in local markets.[12]

Contrary to Petitioners' claims, it is clear that stay of the Commission's access charge reforms would have a serious and detrimental effect on other parties which neither Petitionas, the Commission nor the Court would later be able to rectify.

B. The Public Interest Would Be Disserved By Grant Of The Requested Stay

Petitioners' claims to the contrary notwithstanding, grant of the requested stay would not be in the public interest. The Commission has specifically held that "[c]ompetition in the local exchange and exchange access markets is desirable, not only because of the social and economic benefits competition will bring to consumer of local services, but also because competition eventually will eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition."[13] Further, as the Commission has recently confirmed, "under the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in all

[12] Id. at ¶ 280.

[13] Local Competition First Report and Order, 11 FCC Rcd. 15499 at ¶ 4.

telecommunications rnarkets, by allowing all providers to enter all markets."[14] In order to achieve this goal, the Commission must ensure that incumbent LECs are precluded from effecting "price squeezes" through the manipulation of input prices such as interstate access charges.

The 1996 Act was intended to preserve, promote and facilitate the growth of competition in the telecommunications product and service markets.[15] As the Commission has noted, "the 1996 Act allows telecommunications carriers to purchase access to unbundled network elements and to use those elements to provide all telecommunications services, including originating and terminating access to interstate calls."[16] The imposition of interstate access charges, in addition to the compensation already provided for those elements, stands as a clear impediment to competition; accordingly, a stay of the Commission's Orders would clearly be adverse to the public interest.

C Petitioners' Assertion That Immediate Implementation of the Orders Will Cause Them Irreparable Harm Flies in the Competitive Reality

Petitioners will face relatively little economic harm should the Orders become effective as adopted And since the comparatively small decrease in Petitioners' interstate access revenue can be easily quantified and recouped by Petitioners, irreparable harm to Petitioners simply does not exist.

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[14] Id.

[15] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 1 (1996).

[16] Access Charge Order, FCC 97-158 at ¶ 336, citing Access Charge Reform, (Notice of Proposed Rulemaking), CC Docket No. 96-262, FCC 96-488, ¶ 140 (released Dec. 24, 1996) ("Notice").

Competition in the provision of interstate access services has not yet progressed beyond its nascent stage. The unfortunate reality is that "BOCs currently are the dominant providers of local exchange and exchange access services in their in-region states, accounting for approximately 99.1 percent of the local service revenues in those markets.“" And the Commission has acknowledged that this state of affairs is not likely to change noticeably in the foreseeable future. Inasmuch as the emergence of significant competition remains years away, Petitioners' grossly exaggerated claims of "irreparable harm" cannot support the unleashing of the competitive dangers described by the Department of Justice and other commenters.

As virtually all segments of the industry and the Commission itself acknowledge, interstate access charges are currently set well in excess of the economic cost of originating and terminating interstate, interexchange traffic.[18] The Commission is not blind to the fact that even after a period of years, competition alone may remain insufficient to lower to economic cost the grossly inflated access charges generated by the system of "distortions and inefficiencies" which have "persisted for over a decade"[19] and that indeed, "some services may prove resistant to competition."[20] The Commission has declined to mandate the immediate reduction of grossly

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[17] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489 ¶ 10 (Dec. 24; 1996) ("Non-accounting Order"), recon. FCC 97-52 (Feb. 19, 1997), recon. pending CC Docket no. 96- 149, petition *for summary review in part denied and motion for voluntary remand pending* s u b n ò ˙ m . - Case No. 97-l 118 (D.C. Cir. filed Mar. 6, 1997) (held in abeyance pursuant to court order filed May 7, 1997).

[18] Notice, FCC 96-488 at ¶ 140.

[19] Access Charge Order, FCC 97-158 at ¶ 31.

[20] Id. at ¶ 48.

overstated interstate access charges to economic cost since "any attempt to move immediately to competitive prices . . would require dramatic cuts in access charges for some carriers,"[21] and . as a result has found it necessary to adopt a regulatory backstop which will enable it to "adjust rates to bring them in line with forward-looking costs" when it is apparent that "competition is not developing sufficient for the market-based approach to work.[22] Thus, throughout the course of their appeal -- and for a significant period of time thereafter -- Petitioners will continue to receive access charge revenues compensating them not only for the economic cost involved in originating and terminating access, but as historically been the case, for many times over that economic cost.

The irreparable injury Petitioners claim to face upon implementation of the Commission's Orders in reality represents at most a temporary diminution of access charge revenues for the duration of the Petitioners' appeal of the Orders. In the unlikely event Petitioners are successful on appeal, whatever financial harm is actually incurred can be easily quantified and recouped through subsequent rate adjustments. Accordingly, Petitioners are not even at risk of unrecoverable economic loss and therefore cannot establish the irreparable harm necessary to sustain a stay. In view of the mere budding nature of local exchange/exchange access competition described above, Petitioners claims that they will be prevented from recouping economic losses are simply not credible.

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[21] Id. at ¶ 46.

[22] Id. at ¶ 48.

D. Petitioners Have Not Shown A Likelihood of Success On The Merits On Appeal

Petitioners allege that "a stay of the Access Reform Order is required to allow for the FCC and Eighth Circuit orders to be reconciled".[23] No reconciliation of the Access Charge Order and the Partial Stay issued by the Court of Appeals for the Eighth Circuit (the "8th Circuit)" is necessary for the simple reason that the Commission's Access Charge Order does not conflict, technically or philosophically, with the 8th Circuit's Stay of the pricing provisions of the First Report and Order implementing the Commission's local competition rules.[24] In granting the Partial Stay, the 8th Circuit Court of Appeals noted that "petitioners allege primarily that the FCC exceeded its jurisdiction by imposing national pricing rules for what is essential local service."[25] Through its Access Charge Order, the Commission merely announced the methodology pursuant to which interstate access charges would be calculated, concluding in so doing, that unbundled network elements are not properly within the universe of services upon which interstate access charges will be levied. By exercising its authority over a topic which is purely interstate in nature and thus firmly within the jurisdiction of the Commission, the Commission has raised no concerns addressing "the pricing of *intrastate* telephone services,"[26] the basis for the 8th Circuit's limited stay of the Local Competition First Report and Order. Contrary to Petitioners' opinion' the Commission's jurisdiction over all matters concerning interstate communi'cations, which flows

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23 Petition at 4.

[24] Local Competition First Report and Order, 11 FCC Rcd. 15499 at ¶ 10.

[25] Iowa Utilities Board v. FCC, **Case No. 93-321, et. seq., Order (Oct. 15, 1996) ("Stay Order") at 15.**

[26] Id.

from a direct grant of Congressional authority through the Communications Act of. 1934, as amended' is neither diminished nor weakened by the 8th Circuit's inability to identify "an express grant of authority to the FCC over the pricing of intrastate telephone services.""

Petitioners also criticize as arbitrary the Commission's modifications to the existing price cap index formula, replacing the previous "X-factor" with an X-factor representing the price cap LEC's productivity growth based on total factor productivity ("TFP") calculations and an input price differential. Petitioners first suggest that the Commission erred by not utilizing all the data presented to it and by relying upon "old data"[28] in the course of its examination of the effects of price cap regulation. This criticism can be summed up as follows: the Commission erred by declining to base its price cap regime on *Petitioners' data*. And once again' Petitioners' criticisms are unfounded.

As the Price Cap Order reveals, numerous parties presented the Commission with proposed methodologies and extensive studies in connection with the issues the Commission wished to address. After first concluding that the "staff analysis relies on consistent data sources and methods, and that our input price differential findings are based on consistent and reliable data" the Commission adopted an X-factor "based on a total factor productivity analysis of the impact that LEC productivity grown and the change in LEC input prices have had on LEC industry unit costs over a ten-year period."[29] The Commission further concluded that "[b]oth the

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[27] Id.

[28] Petition at 3.

[29] Price Cap Performance Review for Local Exchange Carriers (Fourth Report and Order), CC Docket No. 94-1, ¶ 145 (released May 21, 1997) ("Price Cap Order").

methodology and the data used in this analysis more accurately reflect price cap carriers' ability to reduce per-unit costs than previous studies used to set the X-Factor."[30] TRA notes that a regulatory agency's deterrnination is not weakened by the use of what Petitioners describe as "old data" when as here, that data represents the combined wealth of knowledge gleaned from a decade's-worth of information drawn from the actual experience of carriers subject to the price cap structure under review.

As the Commission has held,

> [O]ur new price cap structure better suits the advent of competition that lies at the heart of the 1996 Act. Subjecting incumbent LECs to a price cap structure that better replicates the discipline of a competitive marketplace is warranted as we move toward competition itself Furthermore, we conclude that we should adopt a price cap structure that readily lends itself to the further regulatory changes we anticipate will be warranted as competition develops for access services in geographic areas. Finally, we find that reducing our regulatory reliance on earnings calculations based on accounting data is essential to the transition to a competitive marketplace, where forward-looking costs are central to decisionmaking.[31]

Far from being arbitrary or capricious, the Commission's Order modifying the LEC price cap regime, like all of the major implementing Orders, reflects the Commission's persistent adherence to the 1996 Act's directive that promotion of competition will best serve the consuming public. These provisions as well, should be allowed to become effective without delay.

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[30] Price Cap Order, FCC 97-159 at ¶ 145.

[31] Id. at ¶ 150.

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to summarily deny the Joint Petition for a Partial Stay and for Imposition of an Accounting Mechanism Pending Judicial Review filed by Southwestern Bell Telephone Company and Pacific Bell and Nevada Bell in the captioned dockets.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeannine Greene Massey, hereby certify that copies of the foregoing document- were mailed this 9th day of June, 1997, by United States First Class mail, postage prepaid, to the following:

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